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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

NO. 73-1782

ROBERT HOWARD,

Petitioner,

v.

CITY OF CINCINNATI, OHIO,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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MOTION TO AFFIRM OR DISMISS

The Appellee-Respondent moves the Supreme Court of the United States to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Ohio and the Court of Appeals of Ohio for the First Appellate District, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Ohio Supreme Court and of the Court of Appeals, First Appellate District of Ohio appear respectively in Petitioner's Appendix thereto at pages twenty-four and twenty as numbered therein.

STATEMENT OPPOSING JURISDICTION

Jurisdiction does not lie with respect to the instant petition presented by Appellant-Petitioner for the reasons enumerated below:

a. Petitioner's conduct in forcing his way into the complainants' home and the defendant's repeated refusal to leave the premises constitutes the underlying basis for his conviction under the Cincinnati, Disorderly Conduct Ordinance, 901-D4.

b. Defendant's verbal threats to "kill" the complainant are only incidental to the conduct of the defendant's persistent refusal to leave a private premises.

c. The defendant while invading the complainant's constitutional right to privacy cannot now claim injustice under the guise of the First Amendment to the United States Constitution.

Clearly, Petitioner presents no important statutory, factual or constitutional issues as a basis for granting certiorari. The decisions rendered by the courts below with respect to the facts as presented in the instant case are correct and Appellee-Respondent through a Motion to Affirm or Dismiss, herein contained, moves this Honorable Court to dismiss Appellant's petition for lack of jurisdiction.

QUESTIONS PRESENTED

I.

SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING, OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON", COMPLIES WITH THE CONSTITUTIONAL PRENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND IS NOT VAGUE OR OVERBROAD.

II.

THE UNITED STATES SUPREME COURT HAS DECIDED THE REQUISITE STANDARDS AS TO THE CONSTITUTIONAL VALIDITY OF THE DISORDERLY CONDUCT STATUTES AND THE CINCINNATI DISORDERLY CONDUCT ORDINANCE AS APPLIED TO THE FACTS HEREIN COMPLIES WITH THOSE REQUIREMENTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments of the United States Constitution and Section 901-D4, Cincinnati Municipal Code, are set forth in Appellant-Petitioner's Appendix at pages twenty-eight, twenty-nine and twenty-six respectively therein.

STATEMENT OF THE CASE

Defendant-Petitioner, Robert Howard, by his own admission testified at the trial that he had no contact with the complainant for a period of four (4) years preceding the date in question. Defendant further testified that he has been under psychiatric care and presented a statement from the psychiatric clinic administering treatments.

At trial, the defendant testified that he attempted to contact the complainant by telephone and that said complainant refused to see him and hung up on him. When asked upon cross examination,

> (Prosecutor) "Q. Do you understand that this girl doesn't want to see you anymore?"

The defendant's reply was,

> (Defendant) "A. . . . Yes".

The instant defendant never denied that he threatened to "kill" the complainant and in fact testified that:

> "she" (complainant) "kept insisting that I leave" . . . "I did not want to leave."

Also testifying at trial was the complaining witness who is a social worker for the Welfare Department. The complainant testified that on a number of occasions, previous to the date in question, that Robert Howard threatened her even though she had not seen him in four (4) years:

> (Complainant) ". . . that if he couldn't have me, he would rather kill me."

In order to avoid confrontation with the defendant, the complainant gave the post office a change of address. Even though it was necessary to tell the defendant twice, by his

own admissions, on the telephone to stay away, the defendant drove to the town where the complainant lived. The defendant then paid the sum of $1.00 (one dollar) to obtain the complainant's address.

Upon cross-examination by the defense, the prosecuting complainant testified that:

1. Robert Howard forced his way into her home on the date in question,
2. "I asked him to leave several times' but the defendant refused and "persisted in trying to question my roommate . . .",
3. ". . . After being asked numerous times to leave", he finally went out on the porch, leaving his foot in the door . . ."
4. Defendant Howard, with his foot in the door, threatened to kill the complainant, whom he had not seen for four years.

   ". . . he stated that if he couldn't have me, he would kill me."

In addition to the above, the complainant's roommate testified that she heard loud voices and that the prosecuting witness repeatedly asked the defendant to leave the premises, but that the defendant refused to leave.

The instant case was tried without a jury and the defendant was found guilty by the trial court. There was no incarceration imposed at sentencing of instant defendant.

Thereafter, an appeal was taken to the First District Court of Appeals of Ohio on behalf of the defense, and the judgment of the trial court was affirmed. Further appeal to the Ohio Supreme Court resulted in dismissal of the appeal for the reason that no substantial constitutional question exists herein.

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST

This case does not involve any constitutional issues as the conduct engaged in by the instant petitioner is clearly within the peripheria of the narrowly construed Cincinnati, Disorderly Conduct Ordinance and never did fall within that class of constitutionally protected speech and conduct.

It is emphasized that the United States Supreme Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), emphatically rejected the very contentions that the instant defendant attempts to set forth. Precisely:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed." *Cox* v. *Louisiana*

The right of free speech, while fundamental in our democratic society was not intended by the framers of the Constitution to make a course of conduct unpunishable merely because the defendant speaks during the commission of a crime.

The decision below is correct without regard for the questions sought to be raised by the petition and in view of all facts this case clearly does not warrant review by this Court.

ARGUMENT FOR DENIAL OF WRIT

I

SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING, OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON", COMPLIES WITH THE CONSTITUTIONAL PRENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND IS NOT VAGUE OR OVERBROAD.

As construed by the Ohio Supreme Court, the Cincinnati Disorderly Conduct ordinance does not prohibit the lawful exercise of any constitutional right or the lawful enjoyment of any constitutionally protected freedom.[1] The Ohio Supreme Court in *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163 (1972), construed the instant ordinance as not escaping the understanding of any person of "common intelligence" who desires to obey it.

It is emphasized that the facts and issues raised in the instant cases are almost identical to those facts and issues

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[1] *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972), certiorari denied 93 S. Ct. 1370, 35 L. Ed. 2d 583 (1973). In *Hoffman*, defendants failed to obey numerous requests by police officers to stay out of the police cruiser which held a prisoner. Defendants in *Hoffman* were arrested and charged with conduct being contrary to and in violation of said Cincinnati Disorderly Conduct ordinance.

already decided by this Court in *Colten* v. *Kentucky*, 407 U.S. 104 (1972).[2]

Like *Colten*, instant Petitioner's conduct and speech was not an exercise within the purview of any constitutionally protected freedom. What more fundamental right exists than the constitutionally protected "right of privacy"? The complainant in this case knew that the instant defendant was emotionally unstable and took every precaution to avoid him. Even after a four (4) year separation the instant petitioner maintained his active pursuit of the complainant and finally located her and "forced" his way into her home.

The complainant was fearful for her life and testified at trial that the defendant had "threatened to kill" her on many previous occasions. Said defendant ignored the complainant's repeated pleadings for the defendant to leave the residence. In fact, the defendant refused to leave and stuck his foot into the door which prevented the complainant from shutting him out. Then, once again the instant defendant "threatened to kill" the complainant if "he could not have her".

Consequently, there is no basis for distinction between the facts at bar from *Colten* v. *Kentucky*, 407 U.S. 104 (1972). The defendant here had no constitutional right to force his way into complainant's home, refuse to leave after numerous demands and threaten to kill the complainant. There can be no lawful exercise of any constitutional guarantee under this set of facts.

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[2] *Colten* was arrested for disorderly conduct when he failed to comply with a request given by a police officer in the performance of his duties *Colten* verbally expressed discontent with said officer's request and it was that unprotected speech and conduct which resulted in his conviction. There the United States Supreme Court held that the disorderly conduct statute was not unconstitutionally applied for *Colten* had no constitutional right to observe the traffic ticketing process.

As recently as *Cohen* v. *California,* 403 U.S. 15 (1971), this Court specifically pointed out that the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.

In keeping within the guidelines as set forth in *Gooding* v. *Wilson,* 92 S. Ct. 1103 (1972), as applied in *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163 (1972), cert. den. 93 S. Ct. 1370 (1973), it is clear that the conduct and epithets emitted under the set of facts and circumstances now before this Court do not fall within the purview of any constitutionally protected freedom.

II

THE UNITED STATES SUPREME COURT HAS DECIDED THE REQUISITE STANDARDS AS TO THE CONSTITUTIONAL VALIDITY OF THE DISORDERLY CONDUCT STATUTES AND THE CINCINNATI DISORDERLY CONDUCT ORDINANCE AS APPLIED TO THE FACTS HEREIN COMPLIES WITH THOSE REQUIREMENTS.

In June of 1972, this Court specifically decided and set forth definite standards regarding the constitutional validity of the disorderly conduct statutes. *Colton* v. *Kentucky,* 407 U.S. 104 (1972). Consequently, there is no basis for distinction as the factual complex and application of the statutory provisions herein raises issues identical to those recently decided by this Court in *Colten.*

The Cincinnati Disorderly Conduct ordinance, like that in *Colten* fully complies with the requirements of the Due

Process Clause of the Fourteenth Amendment as proscribed by the United States Constitution. Resort to epithets or personal abuse is not in any proper sense communication safeguarded by the Constitution and its punishment, as a criminal act would raise no question under that instrument. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

This Court in *Cox* v. *Louisiana,* 379 U.S. 536 (1965), emphatically rejected the contentions now set forth by the instant petitioner. In applying those standards as set forth in the numerous decisions by this Court, the Ohio Supreme Court construed the instant ordinance as being limited to instances where there is no protected right. Wherefore individuals may not be convicted under the Cincinnati Disorderly Conduct ordinance for the expression of any constitutionally protected freedom.

Precisely, this Court held that where the highest state court has limited the application of the disorderly conduct statute to instances where there is no protected right, then such statute is not impermissibly vague or broad.[3] The Ohio Supreme Court has limited the instant ordinance to exclude constitutionally protected expression. *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972), cert. den. 93 S. Ct. 1370 (1973). The Ohio Supreme Court in *Hoffman* went on further to express that the

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[3] *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Cohen* v. *California,* 403 U.S. 15 (1971); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); and *Gooding* v. *Wilson,* 405 U.S. 518 (1972), are clearly distinguishable from *Colten* v. *Kentucky,* 407 U.S. 104 (1972), and *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163 (1972), cert. den. 93 S. Ct. 1370 (1973). In *Coates, Cohen* and *Gooding,* the statutes involved therein infringed upon the First and Fourteenth Amendments of the United States Constitution. Those State Courts did not narrowly construe the application of the respective statutes and therefore said statutes were found to be unconstitutional.

standard of conduct being specified within the ordinance imposes an "objective" test as enunciated within the recent United States Supreme Court decisions on this issue.

Finally, in *Cohen* v. *California,* 403 U.S. 15 at 20 (1971), citing *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), this Court has also held that the:

> ". . . states are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words', those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke reaction. . . ."

The Ohio Supreme Court in *Cincinnati* v. *Hoffman,* 31 Ohio St. 163 (1972) cert. den. 93 S. Ct. 1370 (1973), and later in *Cincinnati* v. *Karlan,* 35 Ohio St. 2d 34 (1973), has limited the instant ordinance to exclude constitutionally protected expression and limited punishment to the "fighting words" category. The Ohio Supreme Court in deciding *Hoffman* did not create a new standard of proscribed conduct but simply employed the same standard as already existed within the circumscribed ordinance. Precisely, the doctrine of "fighting words" has its roots in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). The application of that doctrine was reaffirmed in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 at 571 (1942), when this Court observed that:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances."

Instant Petitioner erroneously alleges that a finding of guilt was made based upon a mix of free speech and illegal

conduct.[4] The defendant contends that his conduct in forcing his way into the complainant's home and threatening to "kill" her is protected speech. Not so, for resort to epithets or personal threats to "kill" is not in any proper sense communication safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

Unlike *Lewis* v. *City of New Orleans,* 415 U.S. —, 39 L. Ed. 2d 214 (1974), the case at bar does not involve the mere name calling of another individual.[5] Here, there is no conflict of testimony or dispute as to the conduct of the instant defendant as there was in the *Lewis* case.

Furthermore, the Supreme Court of the United States in *Cox* v. *Louisiana,* 379 U.S. 536 (1965), emphatically rejected the very contentions that the defendant here attempts to raise and held that:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed."

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[4] Defendant cites *City of Cleveland* v. *Mechanic,* 26 O. App. 2d 138 (1971), which is distinguishable as the *Mechanic* case pertained to a defendant who was attempting to distribute literature expressing opposition to the Vietnam War. The *Mechanic* case involved the freedom to distribute information to citizens upon a public sidewalk and the right of those citizens to receive such information. However, the case at bar contains no issue involving any constitutionally protected freedom.

[5] In *Lewis,* decided February 20, 1974, the New Orleans ordinance under consideration dealt the prohibition against using obscene or opprobious language toward a city police officer. *Lewis,* was remanded for further proceedings for no limitation of "fighting words" was construed by the highest court of that state.

Consequently, it is clear that the instant defendant had no constitutional right to force entrance into a private residence, refusing to leave and then threatening bodily harm to the victim. Moreover, the facts herein are devoid of any issue capable of reaching constitutional magnitude and are not susceptible of application to protected speech.

CONCLUSION

The ordinance in question is sufficiently narrow and precisely drawn and the application of subject ordinance is in accordance with the constitutional mandates as enunciated within the decisions rendered by the United States Supreme Court.

Wherefore, in applying those standards as set forth in *Lewis* v. *City of New Orleans,* 39 L. Ed. 2d 214 (1974), it is evident for the reasons set forth above, that petitioner's application by writ of certiorari should be denied.

Respectfully submitted.

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